# Central Law Journal.

ST. LOUIS, MO., NOVEMBER 17, 1916.


## DISCRIMINATION BY PUBLIC UTILITY IN FAVOR OF MUNICIPAL CORPORATION.

By contract made in 1886, a city in Maine was to pay to a water company twenty annual payments for a specified number of hydrants and no more, and for water for defined city purposes. Taxes, that might be assessed against the water company, should be taken as the equivalent for the latter. The water company was granted the right to dig up streets for laying of pipes and to fix and collect water rates. City of Belfast v. Belfast Water Co., 98 Atl. 738, decided by Maine Supreme Judicial Court. This contract was carried out faithfully on both sides until January, 1916, when the water company advised the city that the contract was illegal and that from and after April, 1916, it would recognize it no longer, unless arrangements were made for fair compensation for hydrants and for supplying the city with water. Thereupon the above case came up under a bill to enjoin the water company, under the circumstances, from taking the threatened course.

Among other reasons given by the court for sustaining the injunction prayed for, it was said: "Free service to the public is not at common law unreasonably, and, therefore, unlawfully discriminatory. The law against unreasonable discrimination rests on public policy. It is forbidden, because it is opposed to the interest of the public, which requires that all should be treated alike under like circumstances. Discriminations, however, in favor of the public are not opposed to public policy, because they relieve the people generally of part of their burdens. In the absence of legislation upon the subject, such discriminations cannot be held illegal as matter of law without overturning the foundation upon which the rule itself is built."

There is then quoted from a case by New York Court of Appeals holding to be binding and not against public policy a contract by a telephone company to maintain without charge telephones in the public offices of a city. N. Y. Telephone Co. v. Siegel-Cooper Co., 202 N. Y. 511, 36 L. R. A. (N. S.) 560.

It was said in that case that: "Discriminating contracts between public utility corporations and their patrons, which are held to be void as inimical to the public good are so held because unreasonable advantage is thereby given to one customer or a class over others, whereas all have a moral and legal right to equality of treatment. In case of the contract being between a private corporation and the state or other public corporation, whatever advantage the particular customer has over general customers obviously inures to the benefit of the former in the aggregate. In other words, in the ultimate there is no discrimination which is inimical to the public good and hence no violation of public policy."

It seems to be true that while at common law there is merely the requirement that a public utility shall give service to every applicant for fair compensation, but it is not true that all shall be charged the same rate. It has been left to statute to declare, that there shall be a uniform rate to all under like circumstances. Is it, therefore, true, that where a general statute declares that no discrimination shall be shown between customers, courts may reason out an exception in favor of the state or any of the divisions of a state?

States have a business as distinguished from a governmental capacity. When

they enter into contracts not in their sovereign capacity they are treated like individuals. With municipalities of a state the same rule applies.

It may be true that it is hard to discern where a less rate in favor of a city than to an individual or to a private corporation might work any detriment to other customers of a public utility. But there is something else to care for in compelling uniform rates between customers, than the advantage one customer might obtain over another. It is the duty of the state to conserve the ability of a public utility so it may not only presently serve customers, but that it shall continue to be able to serve the public.

This double aspect, then, may make the requirement as to a uniform rate to all a sort of promise to owners of a public utility, that it always shall be enforced. In this way, it becomes not only a limitation on the power of a public service corporation in favor of people generally, but also a guaranty in favor of owners. If rates were fixed in view of free or less charge to the public this would be all right. But you cannot add free service to the public where rates have already been prescribed.

Furthermore, a state is not the absolute owner of the privileges it gives to a public service company, but it holds these privileges in trust for the people generally. It must, therefore, treat companies exercising these privileges according to a trust relation. They must be allowed to conduct their business with their customers according to their normal manner of dealing with them and not as possibly influenced by contracts which may cause them a loss. It surely would not look right to charge the state more than they would a private individual. Why should they be allowed to charge it less?

## NOTES OF IMPORTANT DECISIONS.

ADMIRALTY — MARITIME TORT ONLY WHEN CONSUMMATION WITHIN JURISDICTION.—In Gordon v. Drake, 159 N. W. 340, decided by Supreme Court of Michigan, it was held, that where one on a boat was told by the captain to "jump" and was injured by jumping and falling on a wharf, there was no jurisdiction in admiralty, though the boat was in navigable waters.

This was upon the principle that in admiralty it is the locality and not the origin of injury or the main part thereof, which gives jurisdiction. Does this principle rightly embrace this kind of a case?

The court cites a case of a bale of cotton falling from ship's tackle upon party on wharf; and also a case where one descending a defective ship ladder was injured by being thrown on a wharf, and it must be admitted that holding these cases not to be within admiralty jurisdiction strongly points to the same ruling in the instant case. But for one to jump in an emergency is the same thing as to be struck and caused to fall. If the plaintiff had been given a blow, which knocked him from a ship to a wharf, and he were injured immediately by the blow, there would seem to be a real consummation on the ship and the added injury on the wharf was a natural consequence —not, so to speak, a consummation. In any other way you would have to split up jurisdiction.

This case is not precisely like the cases cited. In the latter the negligence is in insufficient working appliances and the more or less remote consequence is injury in another place. In the former, the injury is the direct result of a tortious act.

RAILROADS—INJURY TO EMPLOYE ON INTERSTATE TRAIN CHARTERED BY CIRCUS.—In Mancher v. Chicago, R. I. & P. Ry. Co., 159 N. W. 422, decided by Nebraska Supreme Court, the question arose whether or not a contract with a circus company came under federal or state law so as to determine whether the former law controlled as to exemption of carrier from all liability to employes of the circus company.

The court said: "If the contracts fell within the federal statute they are void because they undertake to exempt the carrier from all liability, but this was not a contract for the transportation of a mere piece of inanimate freight. It was a contract for the transportation of a person in whose life and safety the state has an

interest, and a contract which would undertake to permit his wanton destruction would be against public policy and void. It does not appear, however, that the liability of the defendant is to be governed by the federal statute. Congress has legislated on interstate shipments as applied to freight, but the act does not reach the questions herein involved, and in the absence of action by Congress the question must be determined by the law of Nebraska. There is no federal legislation touching the liability of railroads growing out of interstate transportation of persons."

The court then refers to Nebraska statute forbidding any limitation of liability by a railroad corporation as a common carrier as to passengers or freight, and this is construed to exclude any power by a railroad to limit liability as to one carried as the servant of another by any arrangement whatever.

It seems true that state law should control in a matter of this kind, but a fair reading of Nebraska statute seems to refer to limitation so far as contracts are concerned between the carrier and its customer. The phrase, "the liability of railroad companies as common carriers shall never be limited," occurs in a section referring to maximum rates, which, of course, means rates charged customers. But, then, it might be said that the servant impliedly authorizes his master to contract for him and, therefore, he stands as well as the master himself can stand, so far as limitation against liability by the carrier is concerned. One should not be allowed to contract in a way for another person for a limitation that would not be enforced against a person contracting in his own right.

---

INDEMNITY — CONTINUATION CERTIFICATE IN SURETY BOND.—Chatham R. E. & I. Co. v. U. S. Fidelity & G. Co., 90 S. E. 88, decided by Georgia Court of Appeals, concerned recovery upon a bond for defalcation of an employe not discovered within six months after expiration of bond, said period being too late under the terms of said bond.

This bond began to run several years ago and was renewed each year by a continuation certificate, which provided that it was "subject to all the covenants and conditions of said original bond." The defalcation occurred between 1907 and 1909, but was not discovered until after employe's death in 1911. Suit was brought on the continuation certificate for the year ending in 1912. The court held that the six months' provision was carried over by the continuation certificate and the action was in time.

The lower court followed a prior decision of of upper court, which showed not a continuation certificate but a new bond, and this case holds that case is to be distinguished. It was said "In that case the suit was brought upon the original bond, and it was attempted to set up liability upon other bonds. The bonds issued in that case bore limitations upon the liability of the company. In this case the continuation certificate was an extension of liability to end at a given date, adopting the original bond as a part of the continuation certificate, subject to all the covenants and conditions of the original bond."

We are unable so to construe the continuation certificate. At the time the original bond was taken out liability would have ended six months after its expiration. It does not appear that by a renewal bond it was intended to extend that period. This was a limitation in the original bond and the continuation certificate says it is subject to all the covenants and conditions of said original bond. Those covenants and conditions, therefore, stood, and the condition of six months' liability applied to the certificate just as to the original bond. There was no consideration for the company taking on responsibility for an old default merely by accepting a premium for a new period. It ought to be very clear, indeed, that there was extension of the period under the original bond or of any intervening continuation certificate.

---

## THE FEDERAL FARM LOAN ACT—II. TAX EXEMPTION PROVISION.

*In General.*—In Part I of this article published in last week's issue of this journal,[1] we discussed the constitutionality of this act in its general features. How about the tax exemption provision? The two great cases to which reference has been made—McCulloch v. Maryland[2] and Osborn v. Bank[3]—arose by reason of efforts on the part of the State of Maryland in the one case and of Ohio, on the other, to tax the United States Bank. The former was an action of debt brought by the State of Maryland against McCulloch, the cashier of a branch of the bank operating in the

(1) 83 Cent. L. J. 329.
(2) 4 Wheaton, 316.
(3) 9 Wheaton, 738.

city of Baltimore, to recover penalties to which it was alleged he was subject for issuing notes on paper other than stamped paper provided by said state, procurable only upon payment of a tax, as prescribed by the state law. The statute obligated in terms every bank not chartered by the Maryland Legislature to issue its notes only upon such stamped paper, from which requirement it could be relieved by the annual payment of $15,000.

It was on the consideration of this feature of the case that the court asserted epigrammatically that the power to tax is the power to destroy. If the State of Maryland could tax the bank $15,000 a year, it could tax it out of existence. Indeed, the requirement of the law probably was prohibitive and was intended to be prohibitive. To concede such a right in a state would be to concede its right to destroy the instrumentalities designed and called into existence by the federal government for the discharge of its functions.

*Agitation Over Attempt to Collect Tax on National Banks.*—The waves of passion aroused by the continuing agitation over the constitutionality of the bank acts, aggravated rather than stilled by the decision in the McCulloch case, as well as over the wisdom of the law from an economic and governmental standpoint, ran high in the state of Ohio. Ohio demanded $50,000 apiece from those located within her borders. That state assumed a leadership in the war upon the bank. Undeterred by the decision in the McCulloch case, rendered March 6, 1819, the state authorities spurred by the intense enmity that prevailed, announced their determination to collect the tax for which the state law declared a liability. The bank on September 14, 1819, the day before that on which the tax became due, filed a bill in equity to enjoin them, and secured a restraining order which, however, was not served, until the 18th, though the fact that it had been issued was publicly known on the 17th, when agents of the state auditor appeared at the branch bank at Chillicothe, leaped over the counter, seized the vaults of the bank, and forcibly collected the tax. By supplemental averments these facts were presented and further appropriate relief was asked. The Circuit Court granted the relief prayed for, and the Supreme Court, on appeal, upon a review of both questions to which it addressed itself in the McCulloch case, reaffirmed the doctrines it asserted.

Mention is made of the conditions out of which the Osborn and McCulloch cases arose, not alone because of their historical interest, but because they serve to emphasize the fact that the tax denounced was one levied upon the operations of the bank, as distinguished from a tax upon its property. Such a distinction was made in the Pacific Railroad cases, in which exemption from state taxation was claimed for all properties of the transcontinental lines upon the ground that they were agencies created or adopted by the federal government to effectuate national purposes. It was asserted and refuted first in the case of Thompson v. Pacific Railroad,[4] in which immunity was claimed on behalf of a government aided road organized under a state charter, and later in Railroad Co. v. Peniston,[5] in which the claimant was a corporation created by virtue of an act of Congress. It is under the doctrine and upon the authority of these cases that reliance is placed, for the greater part, for the claim that the tax exemption section of the bill under review is void.

*Rulings Under Existing National Bank Act.*—Before entering upon an examination of those cases, it will be particularly pertinent to inquire as to the rulings of the courts concerning the power of the states to tax the existing national banks or their property. The analogy between them and the national land banks about to be brought into being is much more close, if, indeed, so far as the question under consideration is concerned, there is not entire identity between the two kinds of national banks.

(4) 9 Wall., 579.
(5) 18 Wall., 5.

The national bank act in terms authorizes the states to tax the owners or holders of shares of national banks at the rate at which other moneyed capital is assessed, and any bank on its real estate as other real estate is assessed.

In Owensboro National Bank v. Owensboro,[6] the court, considering the validity of a statute of the state of Kentucky under which a tax is laid upon the bank under a valuation equal to the sum of its capital, surplus and undivided profits, said:

"Early in the history of this government, in cases affecting the Bank of the United States, it was held that an agency, such as that bank was adjudged to be, created for carrying into effect national powers granted by the Constitution, was not in its capital, franchises and operations subject to the taxing powers of a state.[7]

"The principles settled by the cases just referred to and subsequent decision were thus stated by this court in Davis v. Elmira Savings Bank:[8]

" 'National banks are instrumentalities of the federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a state, to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the federal government to discharge the duties, for the performance of which they were created. These principles are axiomatic and are sanctioned by the repeated adjudications of this court."

"It follows then necessarily from these conclusions that the respective states would be wholly without power to levy any tax, either direct or indirect, upon the national banks, their property, assets or franchises, were it not for the permissive legislation of Congress."[9]

And then, after quoting Section 5219, R. S., U. S., touching the authority of the states to tax a national bank, the court adds:

"This section, then, of the Revised Statutes is the measure of the power of a state to tax national banks, their property or their franchises. By its unambiguous provisions the power is confined to a taxation of the shares of stock in the names of the shareholders, and to an assessment of the real estate of the bank. Any state tax therefore which is in excess of and not in conformity to these requirements is void."

It would seem as though this case left no room for argument that neither the capital nor the property of national banks is subject to taxation by the states except as Congress may expressly consent. But it is advanced that the sole question involved in that case was the right to tax the franchise of the bank, the imposition being referred to as "franchise" taxes. The plain declaration of the court that the property of a national bank is not taxable except as prescribed in Section 5219 is denounced as *obiter*. Without pausing further to inquire into the justice of that criticism, it will be sufficient to remark that the decision in Rosenblatt v. Johnston, 104 U. S. 462, appears to be a direct adjudication of the point. The opening sentence of the brief opinion is as follows:

"The single question in this case is, whether the personal assets and personal property of an insolvent national bank in the hands of a receiver appointed by the comptroller of currency, in accordance with the provision of Section 5234 of the Revised Statutes, are exempt from taxation under state laws, and we have no hesitation in saying that in our opinion they are."

The opinion asserts that the receiver holds for the bank, whose corporate existence is continued, the thought in the mind of the court evidently being that the property being exempt were the bank operating, it is exempt in the hands of the receiver. This is the view taken of the effect of that decision in People v. National Bank of D. O. Mills & Co.[10] The proposition being canvassed, as it was presented in that case, is stated in the opinion thus:

"The attorney-general does not deny that a national bank is a fiscal agent of the

(6) 173 U. S., 664.
(7) McCulloch v. Maryland, 4 Wheat., 316; Osborn v. Bank of the United States, 9 Wheat., 738.
(8) 161 U. S., 283.
(9) 173 U. S., 667, 668.
(10) 123 Cal., 52.

United States, created by it as a means of exercising its powers. Nor does he apparently question the power of Congress to limit or deny the right of the state to tax its property; but he contends that, although the state cannot tax an agency of the United States, it may tax the property of its agents, —at least, where there is no express inhibition by Congress,—and that taxation of the personal property of a bank, as other like property in the state is taxed, is not prohibited, either expressly or impliedly, by the act of Congress."

Touching the question so raised, Temple, J., for the court, said:

"It seems to me that the precise question was determined in Rosenblatt v. Johnson, 104 U. S. 462, 26 L. ed. 832. A state attempted to tax the personal assets of an insolvent national bank. It was quite naturally thought that it had then ceased to be a governmental instrumentality. In a short opinion by the chief justice it was held that, as the assets still belonged to the corporation, they were exempt, under Section 5234 of the Revised Statutes of the United States. In Covington City Nat. Bank v. Covington, 21 Fed. Rep. 489, Mr. Justice Matthews refers to the case. After asserting the power of Congress in the premises, he says: 'It has in fact withdrawn them and their property from the domain of state taxation, except so far as it has expressly consented that they may be taxed. That consent, so far as it has been given, is contained in Section 5219 of the Revised Statutes. It does not permit taxation of any property belonging to the bank, except only its real estate, as clearly appears from Rosenblatt v. Johnston."[11]

This decision was followed in First National Bank of San Francisco v. City and County of San Francisco,[12] and in San Francisco v. Crocker-Woolworth Natl. Bank.[13]

*The Railroad Cases.*—Having now in mind the adjudications in reference to the immunity of the property of national banks from state taxation, let us return to make a more critical examination of the railroad cases.

(11) 104 U. S., 462, 26 L. ed., 832. Id. 759.
(12) 129 Cal., 69.
(13) 92 Fed., 273.

The basis of the claim advanced therein is briefly but comprehensively stated in the opinion in the Thomson case, as follows:

"It is urged that the aids granted by Congress to the road were granted in the exercise of its constitutional powers to regulate commerce, to establish post-offices and post-roads, to raise and support armies, and to suppress insurrection and invasion; and that by the legislation which supplied aid, required security, imposed duties, and finally exacted, upon a certain contingency, a percentage of income, the road was adopted as an instrument of the government, and as such was not subject to taxation by the state."[14]

It will be remembered that the company claiming the exemption in that case was not a federal corporation. Frequent mention of that fact is made in the opinion in connection with the remark of the chief justice in the Osborn case to the effect that "It (the bank) is not an instrument which the government found ready made, and has supposed to be adapted to its purposes, but one which was created in the form in which it now appears, for national purposes only." But, as stated, the doctrine announced in the Thomson case was afterwards applied in the Peniston case, in which a corporation created by act of Congress claimed the exemption.

No effort will be made to demonstrate a complete harmony between those cases and the later decisions in relation to the property of national banks. Doubtless there is an essential difference between means employed by the government and the property of agents employed by the government. At least the court in the Thomson case stated that there is a clear distinction between them, and then added:

"Taxation of the agency is taxation of the means; taxation of the property of the agent is not always, or generally, taxation of the means."

And in the Peniston case the same idea was expressed in this language:

"Here is a clear distinction made between a tax upon the property of a government

(14) Thomson v. Pacific Railroad, 9 Wall., 587.

agent and a tax upon the operations of the agent acting for the government."

"This distinction, so clearly drawn in the earlier decisions, between a tax on the property of a governmental agent, and a tax upon the action of such agent, or upon his right to be, has ever since been recognized. All state taxation which does not impair the agent's efficiency in the discharge of his duties to the government has been sustained when challenged, and a tax upon his property generally has not been regarded as beyond the power of a state to impose."[15]

The court had in mind the embarrassing consequences that would result from acceptance of the views urged upon it by the representatives of the railroad companies, saying, in the earlier case:

"It would remove from the reach of state taxation all the property of every agent of the government. Every corporation engaged in the transportation of mails, or of government property of any description, by land or water, or in supplying materials for the use of the government, or in performing any service of whatever kind, might claim the benefit of the exemption. The amount of property now held by such corporations, and having relations more or less direct to the national government and its service, is very great. And this amount is continually increasing; so that it may admit of question whether the whole income of the property which will remain liable to state taxation, if the principle contended for is admitted and applied in its fullest extent, may not ultimately be found inadequate to the support of the state governments."

Having in mind another important consideration presently to be adverted to, the court thus announced its ultimate conclusion:

"It is, therefore, manifest that exemption of federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of federal powers."

The attention of the Supreme Court was called to those decisions in a recent case, in the opinion in which a suggestion was thrown out through which whatever of irreconcilable inconsistency there may be between the railroad cases and the bank cases may disappear. The reference is to Central Pacific Railroad Company v. California,[16] in which an attempt was made to apply the doctrine declared in California v. Pacific Railroad Companies, 127 U. S. 1, that the state cannot impose a license or other franchise tax up on the transcontinental railroads created or aided through national legislation. After reviewing the decisions in the earlier cases, the court, in 162 U. S. 125, remarked:

"It may be regarded as firmly settled that although corporations may be agents of the United States, their property is not the property of the United States, but the property of the agents, and that a state may tax the property of the agents, subject to the limitations pointed out in Railroad Co. v. Peniston. Van Brocklin v. Tennessee."[17]

And then follows this significant language:

"Of course, if Congress should think it necessary for the protection of the United States to declare such property exempted, that would present a different question. Congress did not see fit to do so here."

Reference is repeatedly made in the Thomson case to the fact that Congress had not declared that the property of the railroad company should be exempt. The importance which this feature of the case assumed in the mind of the court may be gathered from the observations taken from the opinion:

*"It is to be observed that this exemption is not claimed under any act of Congress."*

"It is claimed that this state corporation, owing its being to state law, and indebted for these benefits to the consent and active interposition of the state legislature, has a

(15) Id. 36. Railroad Company v. Peniston, 18 Wall., 35, 36.

(16) 162 U. S., 91.
(17) 117 U. S., 151, 177.

constitutional right to hold its property exempt from state taxation; and this without any legislation on the part of Congress, which indicates that such exemption is deemed essential to the full performance of its obligations to the government."

*"But can the right of this road to exemption from such taxation be maintained in the absence of any legislation by Congress to that effect?"*

"We do not doubt, however, that upon the principles settled by that judgment, Congress may, in the exercise of powers incidental to the express powers mentioned by counsel, make or authorize contracts with individuals or corporations for services to the government; may grant aids, by money or land, in preparation for, and in the performance of, such services; may make any stipulation and conditions in relation to such aids, not contrary to the Constitution; and *may exempt, in its discretion, the agencies employed in such services from any state taxation which will really prevent or impede the performance of them.*"

"It will be safe to conclude, in general, in reference to persons and state corporations employed in government service, that when Congress has not interposed to protect their property from state taxation, such taxation is not obnoxious to that objection."

But more significant than these comments is the brief concurring opinion of Justice Swayne, in the Peniston case, as follows:

"I concur in the affirmance of the judgment in this case. I see no reason to doubt that it was the intention of Congress not to give the exemption claimed. The exercise of the power may be waived. But I hold that the road is a national instrumentality of such a character that Congress may interpose and protect it from state taxation whenever that body shall deem it proper to do so. For some of the leading authorities in support of the principle involved in this view of the subject I refer to The Chicago & Northwestern Railway v. Fuller, 17 Wall. 560, decided by this court a short time ago."

Three of the justices dissented. It can, accordingly, be regarded as still a quite open question whether Congress might not, if it so expressly declared, make the property of a national railroad corporation exempt from state taxation. All that can be claimed for the Thomson and Peniston cases is that in the absence of any declaration on the subject by Congress, it will be presumed that it did not intend that the property of such a corporation should be exempt.

A remark of the chief justice in the McCulloch case is much relied on to sustain the claim that the property of the federal corporation is not immune. It did not escape notice in the railroad cases and contributed, no doubt, to the result reached in them. In concluding the discussion, it is said:

"This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state."

It will be noticed that it is not here asserted that the state might properly impose such a tax. At best it is a simple declaration that the imposition under consideration was not of that character. It was followed by this sentence:

"But this is a tax on the operations of a bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional."

*Can the Bonds to be Issued be Made Exempt?*—There remains an aspect of the general inquiry, the most interesting and perhaps the most doubtful in which it presents itself. It may be recalled that in terms the bill exempts not only the capital and surplus of the banks and associations, and the income derived therefrom and the mortgages to deal in which is their business, but the bonds of the land banks as well. It is strenuously insisted that the bonds of the banks, when they shall have passed into the hands of private holders, cannot be denominated as means or instrumentalities of the government and must become subject to the taxing power of the state, past the power of the federal government to protect

them. It must be conceded that Congress has no general power to exempt property from state taxation. In a way such exemption as any property enjoys on any federal ground arises from its relationship to the operations of the government—not from any declaration on the part of Congress. National legislation can act only on such property as becomes exempt under the rules to which our thought has been directed, to withdraw the exemption to which such property would otherwise be entitled.

Are the bonds to be issued by the land banks of that class, in view of the origin and character of the institutions that are putting them out and the declared purpose of Congress? Do they stand on the same footing as to their taxability as government bonds, treasury notes or greenbacks? Are national bank notes in the hands of private individuals or corporations subject to state taxation, considering the question apart from the act of 1894 lifting the embargo upon the states with respect to taxation of all forms of national currency, or was it within the power of Congress to make them so? It will be recalled that the law last above referred to conferred in terms upon the states power to tax such notes. This might seem a clear legislative declaration that they had not theretofore been so subject, and perhaps such is a legitimate inference to be drawn from the legislation.

The debates in Congress, however, disclose that those who spoke when the act of 1894 was in course of its passage quite generally entertained the belief that they were not exempt. It was stated that it had been held in Mississippi that they were not proper subjects of state taxation and that the bill was framed to meet that condition. At the same time, it was asserted that the weight of authority was against the claim of exemption and specially that it had been so determined in Indiana and North Carolina. The Indiana case referred to,[18] expressly reserves the point here being considered, though the court does indicate that it "can see nothing in the paper itself or the circumstances of its issue which would authorize such a limit to be placed on the power of the state to tax." It merely held, as a matter of statutory construction, that the language of the act of 1862, above quoted, repeated in the act of June 30, 1864, in the following language: "All bonds, treasury notes and other obligations of the United States shall be exempt from taxation by or under state or municipal authority," is not sufficiently comprehensive to include national bank notes. If this be the proper view, then it might be argued with force that by omitting to make specific mention of them Congress intended they should not be exempt, even granting they might have had that character, had there been no legislation on the subject, or conceding the power of Congress to give it to them. The Mississippi case is equally inconclusive. It gives a directly opposite construction to the act, saying only:

"The national bank notes issued by the national banking associations, under authority of Congress, are also obligations of the national government, the only difference between them and the legal tender notes being that the government is primarily liable for the latter, and secondarily liable for the former, upon the failure or default of the national bank issuing the notes. Acts of February 23, 1863, March 3, 1863, June 3, 1864, and June 30, 1864."[19]

The North Carolina cases,[20] like the Indiana case, simply hold that Congress has not declared that national bank notes are exempt. Unlike the Indiana court, however, the view is clearly intimated that Congress might extend the exemption. The opinion in the Ruffin case concludes as follows:

"The truth is that the United States government has no interest in national banks. It authorizes them in order to provide a currency, not for the government, but for the people. And it has the power to regulate and to protect them. To this end it

(18) Board v. Elston, 32 Ind., 27.

(19) Horne v. Green, 52 Miss., 452-454.

(20) Ruffin v. Commissioners, 69 N. C., 499-511; Lilly v. Commissioners, Id. 300.

provides for the redemption of their notes, protects them from the imposition of counterfeits and from injurious competition of state banks, by a heavy tax on state bank bills, and no doubt might further protect them by forbidding the state to tax them. But this has not been done, and until it is done, we suppose the state has the power to tax them. It seems that all that is to be inferred from the decision in Veazie Bank v. Fenno, *supra*, is not that national bank bills are exempt, but that Congress has the power to exempt them from state taxation."

Veazie Bank c. Fenno,[21] referred to, as will be recalled, upheld the act taxing the circulation of the state banks that it might be displaced by national bank notes.

A more persuasive case than any of those referred to on this point is State of Nevada v. First National Bank of Nevada, *supra*. Its capital, to the extent of $75,000, was converted into national bank notes. It either held these notes in part in its vaults or held the obligations of parties to whom they had been passed out in the course of business. The state assessed the bank to the amount of $75,000 on account of money out at interest. The tax was held void, the court saying:

"The notes and bonds in this case, although undoubtedly property, and perhaps such as may be treated as having a locality in the state, are such property as the bank must deal in, in the ordinary course of its business. By a sufficient tax on that commodity in which the bank must of necessity deal, you may entirely destroy the business of the bank. This, then, partakes somewhat of the nature of a tax on the *business* of the bank, although ostensibly a tax on local property."

This is the crux of the situation. By a tax on the circulation of national banks they could be driven out of business, at least so far as their business rests upon the circulation privilege. The national government drove the state bank circulation out of existence by imposing a tax of ten per cent of the amount of any notes used as currency and issued by any individual or state bank upon any bank which should pay out any such. The issue before us is as to whether the states could retort and drive the national bank circulation from the channels of commerce by similar legislation. The question answers itself. The fact that no state ever ventured upon retaliatory legislation is proof of a general conviction that it would have been ineffectual. When Congress, in 1894, gave its sanction to the enabling act heretofore quoted it was careful to add a proviso to the effect that "any such taxation shall be exercised in the same manner and at the same rate that any such state or territory shall tax money or currency circulating as money within its jurisdiction."

The bonds of the banks for whose creation the Land Bank Act provides, are vital to the system of which they form a part. The ordinary bank supplements its capital by the acceptance of deposits. In other words, it borrows from its depositors. It may, indeed, replenish its coffers by discounting the securities which it holds, and as it thus becomes liable for their payment the transaction is essentially one of borrowing. It may, likewise, borrow directly, pledging its securities. It may borrow by issuing circulating notes. No bank contemplates the transaction of business solely upon its original capital. It is implied in the nature of the business that money will be borrowed as well as loaned. The land banks are accorded no such general right of borrowing as is ordinarily enjoyed by commercial banks. It was intended that they should occupy an entirely different field. They are, accordingly, prohibited from transacting any banking business, not expressly authorized by the act creating them. Specifically they cannot accept deposits payable upon demand except from their own stockholders. They cannot issue circulating notes. They are not permitted to carry on a general exchange business. They are authorized, indeed, to borrow money, but as the great bulk of collateral available to them as security for any money they may borrow will consist of farm mortgages, it is unlikely that this general power can be more profitably resorted to than the power to issue bonds. This power may not

(21) 8 Wall., 533.

inaptly be described as the keystone of the system. It would crumble under a state law imposing a tax of, say, ten per cent upon bonds issued by any land bank, in the hands of individuals other than the bank, an imposition which would not offend against the rule of uniformity.

In the case of Weston v. Charleston,[22] the court considered an ordinance of the city of Charleston in terms making "stock of the United States"—in modern parlance, United States bonds—taxable. The court found no difficulty, as is well known, in reaching the conclusion that the Constitution forbade the exercise of the power thus assumed. The course of its reasoning can be followed from a few brief extracts from the opinion. Therein we read:

"Congress has power to borrow money on the credit of the United States. The stock it issues is the evidence of a debt created by the exercise of this power. The tax in question is a tax upon the contract subsisting between the government and the individual. * * *

"If the right to impose the tax exists, it is a right which in its nature acnowledges no limits. It may be carried to any extent within the jurisdiction of the state or corporation which imposes it, which the will of each state and corporation prescribe..

"The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends upon the will of a distinct government. To any extent, however, inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely.

"It is admitted by the counsel for the defendants, that the power to tax stock must affect the term on which loans will be made."

If government bonds were subject to taxation by the states, they could not, obviously, be sold as advantageously as they are now. Either they must bear a higher rate of interest or they must be issued below par. So with the bonds of the land banks. It is hoped and believed that they will be absorbed at par though they bear interest at a rate only a little in advance of the bonds of the government. Similar securities in Germany and other European countries find a ready market on terms almost, if not quite, as favorable as those upon which the government is able to borrow. If they are subjected to a tax in the hands of the holder, even though it be no greater than that levied upon property generally within the state, the burden must fall almost entirely, if not altogether, upon the banks issuing them. The bonds go upon the market bearing a rate of interest substantially equal to the sum of what they would otherwise bear and the tax rate. It is not difficult to perceive that the effect, so far as the operations of the bank are concerned, would be exactly the same as though it were required on issuing the bonds to pay a tax equal to that levied upon property generally, or equal to any specific tax that might be exacted from the holder of such bonds. Could a law of a state be justified under which any land bank would be required to pay a tax upon the bonds issued by it under the authority of this federal statute? That was the very condition of things presented in the McCulloch case. Maryland sought to compel the United States Bank to pay a tax upon all notes issued by it by requiring them to be printed upon stamped paper, furnished for a fee by that state. It is unnecessary to rely upon the reasoning of that case. The decision itself forbids the taxation by the states of the bonds to be issued by the federal land banks, except with the consent of Congress, and the language of the bill discloses the purpose of Congress not to withdraw the immunity from such bonds.

If any serious doubt of the constitutionality of the measure as a whole or the validity of the important tax exemption privilege should be aroused, the success of the system, in the critical period of its infancy, would be imperiled. It was in the hope of dispelling any alarm that may be felt in consequence of opinions expressed, as I must think, without opportunity for ade-

(22) 2 Pet., 446.

quate study, by lawyers in the Senate of deservedly high reputation, who ventured to question the soundness of the legislation on constitutional grounds, that this occasion was utilized, with perhaps painful prolixity, publicly to justify it.

T. J. WALSH.

Washington, D. C.

---

## INSURANCE—INDEMNITY.

### EBERLEIN v. FIDELITY & DEPOSIT CO. OF MARYLAND.

Supreme Court of Wisconsin. Oct. 3, 1916.

159 N. W. 553.

Policy of insurance, indemnifying employer against loss through injuries to employes, is contract to indemnify assured alone, and payment of loss by him is a condition precedent to his right to maintain an action on the policy.

This is an action to recover upon a policy of insurance issued March 15, 1912, by the defendant to the Wisconsin Fruit Package Company, to indemnify it from loss resulting from injuries to its employes. By the terms of the policy the defendant agreed to indemnify "the assured against loss from the liability imposed by law on account of bodily injuries or death" suffered by employes as the result of the negligence of the assured, and contained a clause providing that no action should be brought under it unless after a final judgment rendered in a suit by the employe and within two years from the date of the judgment "for a loss that the assured had actually sustained by the assured's *payment in money*" of a final judgment rendered after trial in an action against the assured for damages on account of the negligence of the assured. The action was tried by the court, and the facts were not in dispute.

An employe of the assured, named Castonguay, received an injury while at work, and brought action therefor against the assured, of which action the defendant took entire charge. After said action was commenced, and on November 22, 1913, an involuntary petition in bankruptcy was filed against the assured, an adjudication of bankruptcy followed on December 8, 1913, and a trustee was appointed and qualified. The assets were scheduled at $26,025.67, and the liabilities at $65,558.22, of which $20,918.04 were either secured or priority claims. A verdict of $1,500 was rendered against the assured in the Castonguay action September 18, 1913, upon which judgment was not rendered until January 31, 1914. In March, 1914, all the property of the bankrupt was sold by the trustee to one Fish. The business of the bankrupt ceased upon its bankruptcy. In November, 1914, a meeting of the stockholders of the bankrupt corporation was held and a board of directors elected, which board held a meeting in December, 1914, and passed a resolution reciting the rendition of the Castonguay judgment and authorizing the treasurer of the corporation to take steps to secure funds to pay the judgment and to assign as security for the loan any property or rights which the corporation might have. The regularity and validity of this meeting is attacked by the appellant, but in the view taken by the court of the case it is not necessary to consider the question.

In April, 1915, the treasurer of the corporation, Mr. E. A. Schmidt, went with the plaintiff (who was the plaintiff's attorney in the Castonguay action) to the German-American National Bank of Shawano. Schmidt gave to the bank the note of the company, indorsed by himself and Mr. Eberlein, for the amount of the Castonguay judgment, the cashier handed the money to Mr. Schmidt, who handed it to Mr. Eberlein, who at once delivered a satisfaction of the Castonguay judgment to Schmidt, and deposited the whole sum in the same bank to his own credit by virtue of an agreement with Castonguay that he (Eberlein) was to retain the money to secure his indorsement of the note, and that Castonguay was not to receive any of it unless Eberlein was successful in the present action. It was understood at the time that the bankrupt had no funds; that Eberlein was the responsible man, to whom the bank would have to look for its pay; and that suit was to be brought against the defendant on the policy, and when the amount was collected in that suit it was to be used to pay the note. On the same day, the corporation assigned to Eberlein any claim it might have under this policy, and Eberlein thereafter brought this action. The circuit court concluded that there was no fraud in the transaction, and rendered judgment against the defendant for the amount of the Castonguay judgment and interest. The defendant appeals from that judgment.

Williams & Stern, of Milwaukee, for appellant. Eberlein, Eberlein & Larson, of Shawano, for respondent.

WINSLOW, C. J. (after stating the facts as above). The claim of Castonguay was purely

a tort claim, unliquidated, not reduced to judgment until after the adjudication in bankruptcy, and hence not a debt provable in the bankruptcy proceedings. In re Crescent Lumber Co. (D. C.) 154 Fed. 724; Dunbar v. Dunbar, 190 U. S. 340-350, 23 Sup. Ct. 757, 47 L. Ed. 1084. It follows, necessarily, that the title to the insurance policy did not pass to the trustee in bankruptcy, but remained with the bankrupt, to indemnify it against loss. The bankruptcy proceedings may therefore be dismissed from consideration.

It is settled in this state, in accord with the weight of authority elsewhere, that a policy of insurance, like the one before us, is a contract to indemnify the assured alone, that there is no privity of contract between the insurer and the injured employe, and that payment of the loss by the assured is a condition precedent to the right to maintain an action on the policy by the assured. Stenbom v. Brown-Corliss Co., 137 Wis. 564, 119 N. W. 308, 20 L. R. A. (N. S.) 956, and cases cited in the opinion in that case. In the Stenbom Case it was also held that, under a policy which contracted to reimburse the assured for a loss "actually sustained and paid" by him, the payment may be made otherwise than in money, provided the same is made and accepted in good faith and there is a bona fide settlement and satisfaction of the judgment secured by the injured employe. In the present case the condition of the policy provides that there must be "payment in money" by the assured before there arises liability upon the policy. It may well be that this provision would logically take the case out of the last-named rule. We do not find it necessary, however, to decide that question.

Assuming that the words used in the present policy are no stronger in legal effect than those used in the Stenbom policy, we are well convinced that there was no payment shown here. True, the corporation gave an absolute note to the bank, which Eberlein indorsed, and the money was secured on that note. Had Mr. Eberlein turned that money over to Castonguay and been content to look to the defendant's contract for his protection, a very different question would have been presented. But the money has never been used to pay the judgment, and never will be unless there is a recovery in this action first. This exactly reverses the terms of the defendant's contract. That contract is to pay the assured what the assured has first been compelled to pay to the injured person; the arrangement now to be substituted provides for paying the injured person what the insuranre company has first been compelled to pay to the assured. To say that the assured has actually paid a judgment, when the money has merely been secured from the bank on a note, and never has reached the judgment creditor, but is held by an indorser of the note as security for his indorsement, and is to be turned over to the bank at once in case of failure in the present action, is to make substance out of shadow.

The case principally relied on by the respondent is the case of Herbo-Phoso Co. v. Phila. Cas. Co., 34 R. I. 567, 84 Atl. 1093. While there are some similarities in the two cases, there are also very substantial differences, and we cannot consider it as controlling, or even as very persuasive, as applied to the facts before us.

Judgment reversed, and action remanded, with directions to render judgment for the defendant dismissing the complaint.

NOTE.—*Payment by Note as Sufficient Under Policy to Reimburse Insured for Loss Actually Suffered.*—All that was held in the Stenbom case referred to by the instant case was that there was merely a nominal compliance with the terms of the insurance contract—a mere scheme to raise money by a receiver to settle a claim in favor of an employe. Many cases hold, however, that a note given in *bona fide* settlement of a claim and accepted as such by an employe may be the predicate of a claim against an insurance company. Thus an unsecured note given to a minor employe under approval of the probate judge was a sufficient payment to make the indemnity company liable. It was said the approval of the probate judge is alone sufficient to dispel any idea of bad faith and required cogent proof to the contrary. Though the note was not secured it was said the insured apparently had sufficient property to pay any judgment that could be obtained. It was said that: "Had the assured paid the judgment, that had been recovered in cash out of its own funds or paid it in money borrowed from another, there could be a secret agreement to repay it or some part of it to the assured after the collection is made from the insurance company." Taxicab M. Co. v. Pacific Coast Cas. Co., 73 Wash. 631, 132 Pac. 393.

In Kennedy v. Fidelity & C. Co., 100 Minn. 1, 110 N. W. 97, 9 L. R. A. (N. S.) 478, 117 Am. St. Rep. 658, it was said: "The whole argument of appellant rests upon the claim that the mere giving of the notes did not amount to a loss actually sustained, for the reason that the maker of the notes and the guarantor might never be called upon to make payment, might become insolvent, that there is no certainty they will ever be paid, and, if not paid, there is no loss actually sustained. This means that the assured, no matter what his financial condition might be, would be compelled to raise the actual cash within sixty days and pay it to the judgment creditor or be foreclosed from enforcing the indemnity against the company. If the position is sound, the money could not be raised by borrowing at a bank, or at any other place, upon promissory notes secured either by a signer or by property, because, be-

fore the notes become due, the property might become worthless, deteriorate in value, or the parties might become insolvent, and no actual payment ever be made; hence no loss. * * * Of what consequence is it to the company whether respondent has on hand immediate cash to pay the judgment, or whether the judgment debtor is compelled to borrow that amount on the most favorable terms, or whether he makes the payment and then secures satisfaction by the execution of promissory notes running direct to the judgment creditor? * * * If the assured accomplished the satisfaction and payment of the judgment by executing and delivering the promissory notes, the good faith of that transaction was hardly open to question, even though it gave the assured the advantage of collecting from appellant company the amount of insurance before the notes came due."

The above case was expressly approved in Seattle & S. F. R. Co. v. Maryland Cas. Co., 50 Wash. 44, 96 Pac. 509, 18 L. R. A. (N. S.) 121, 126 Am. St. Rep. 886, and it was held that a note is a payment amounting to an actual loss, if given in good faith. The opinion says: "Appellant insists that the maker of the note may be insolvent, or that the note may be compromised or settled for a sum less than the indemnity policy. These matters are held immaterial in some of the cases cited."

Wilson v. Hite, 154 Ky. 61, 157 S. W. 41, held a surety upon a supersedeas bond could recover on an undertaking to indemnify him where he gave a note to the assignee of the judgment notwithstanding that it appeared that then he did not have sufficient property to pay the note and at the time the note was given an action on the bond had been dismissed without prejudice, instead of as settled.

In Herbo-Phoso Co. v. Philadelphia Cas. Co., 34 R. I. 567, 84 Atl. 1093, the words in the policy read, "for loss or expense actually sustained and paid in money." The insured gave a note for the amount of the judgment debt and received a cashier's check which it gave to plaintiff's attorney. The attorney then with client's consent deposited the check in the bank of the cashier and received a certificate of deposit which was pledged as collateral to the note. The note was renewed and plaintiff paid the interest. No agreement however existed, whereby payment was contingent on the happening of any event. It was claimed that the whole thing was a subterfuge but the court said: "Those notes, so far as appears, are valid claims against the assured, and the agreed facts serve to strip the transaction of any collusive feature which could effect any modification of his liability thereon." It hardly could be made to appear more certainly than it did, that this was an arrangement contemplating the winding up of the matter when payment would be made by the casualty company.

In West Riverside Coal Co. v. Maryland Cas. Co., 155 Iowa 161, 135 N. W. 414, 48 L. R. A. (N. S.) 195, the insured, a corporation, caused two of its directors to procure a loan to pay a judgment insured against. A bank refused to loan to the corporation except on the directors pledging collateral of their own and to secure these directors the corporation assigned to them its book accounts. The court said in disposing of the corporation's suit against the indemnity company that: "It is urged with much persistence and ability that the judgment was in fact paid by (the directors) and that they are the real parties seeking recovery from this defendant. It is true that the defendant never undertook to protect (these directors) against loss. Its obligation was to the coal company alone, and it is elemental that its liability cannot be extended beyond the terms of its contract. * * * But, notwithstanding the strictness of this rule, we are of opinion, that it must be held as a matter of fact and law that the plaintiff did pay the judgment in question, and that because of such payment it has suffered a loss within the meaning of its contract with the defendant." The court goes on to speak of the coal company then being involved, but: "The situation would not have been different from a legal standpoint had the bank furnished the money on plaintiff's note bearing the indorsement of these directors."

These cases seem opposed generally to the ruling in the instant case, and show that the contracts of indemnitors are construed with more liberality than it construes them. C.

## HUMOR OF THE LAW.

Magnate—"I give that lawyer $10,000 a year to keep me out of jail."

"Oh, John! Please stop spending your money so foolishly."

---

Judge: "I'm surprised at your going to law over a pig. Why don't you settle it out of court?"

"We was goin' to settle it out of court, yer Honor, only a cop came and pulled us apart!"

---

A witness was examined before a judge in a case of slander, who required him to repeat the precise words spoken. The witness, fixing his eyes earnestly upon the judge, began: "May it please your Honor, you lie, and steal and get your living by cheating." The face of the judge reddened, and he exclaimed, "Turn your head to the jury when you speak."—*Wit and Wisdom.*

---

Counsel for the plaintiff: And so on the twelfth of the month you called on Mr. Wilkinson? Now, what did Mr. Wilkinson say to you?

Counsel for the defendant: I object to that question.

The question was thereupon debated for half an hour, and was allowed by the judge.

"Now, witness," said the counsel for the plaintiff, triumphantly, "on the twelfth of the month you called on Mr. Wilkinson. What did he say to you?"

Witness: He wasn't at home.—*National Corporation Reporter.*

## WEEKLY DIGEST

**Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.**

*Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co. St. Paul, Minn*



1. **Adoption**—Indenture.—An indenture, binding out a girl as an apprentice until 18 years of age, and reciting that the true intention was to regard her as an adopted child, made her an apprentice only, and expired when she became 18 years old; the language regarding adoption simply describing the sentiment of the relation created.—In re Bowdoin's Estate, N. J., 98 Atl. 514.

2. **Adverse Possession**—Trustee. — Adverse possession will run against trustee appointed by chancery court, so as to bar both legal and equitable estates.—Stoll v. Smith, Md., 98 Atl. 530.

3. **Attorney and Client**—Disbarment.—Where, in disbarment proceedings the accuser sought to add new and independent charges not investigated by the Attorney-General, it was within the discretion of the referees to allow amendment, and their order to investigate such charges, and, pending investigation, decree denying amendment and dismissing proceedings for failure of evidence, was not an abuse of discretion.—In re Polley, S. D., 159 N. W. 42.

4.——Disbarment.—Where the attorneys admitted a number of alleged misappropriations of funds of clients, and alleged them to be due to his ill health and habit of drink, plea of reformation and partial restitution was immaterial.—In re Webb, S. D., 159 N. W. 107.

5. **Bankruptcy**—Adjudication.—After adjudication in bankruptcy an action against debtor of bankrupt cannot be maintained, either by the bankrupt's assignee for the benefit of creditors or his trustee in bankruptcy in the name of the assignee, notwithstanding Code Civ. Proc. § 756, and Bankr. Act, § 67.—Gilbert v. Mechanics & Metals Nat. Bank of City of New York, N. Y., 160 N. Y. Supp. 710.

6.——Assets.—Any interest of a bankrupt in property or a fund which he could by any means have transferred passes to his trustee, although it may not have been subject to seizure on execution against him. (Per Trieber, District Judge.)—Pollack v. Meyer Bros. Drug Co., U. S. C. C. A., 233 Fed. 861.

7.——Concealment.—The failure of a bankrupt to account for property in his possession shortly before adjudication and not included in the schedule raises a presumption of concealment.—In re Brincat, U. S. D. C., 233 Fed. 811.

8.——Conversion.—Brokers' failure to return on demand securities delivered to them held not a conversion, time being extended, and so their subsequent return was not a preference.—Robinson v. Roe, U. S. C. C. A., 233 Fed. 936.

9.——Discharge.—In voluntary bankruptcy, the bankrupt may, under Bankr. Act, § 14b, as amended by Act June 25, 1910, § 6, be granted a discharge as to debts from which, in a voluntary proceeding had within 6 years previous, he was not discharged, because application was not filed within the 12-month period.—In re Skaats, U. S. D. C., 233 Fed. 817.

10.——Discharge.—The right to apply for a discharge in bankruptcy is personal to the bankrupt, and his failure or delay in applying therefor cannot affect the rights of third persons, other than in so far as he may fail to procure a discharge from subsequent liability on their claims.—In re Skaats, U. S. D. C., 233 Fed, 817.

11.——Discharge.—Though Bankr. Act, § 14b, precludes more than one discharge in voluntary bankruptcy within a period of six years, an insolvent may have more than one adjudication within the period and his property distributed among his creditors, though he can obtain but one discharge.—In re Johnson, U. S. D. C., 233 Fed. 841.

12.——Discharge.—Where a debtor, having once within the six-year period been adjudicated a voluntary bankrupt, filed a second petition, a creditor suing in the state court will not, as Bankr. Act, § 14b, prevents more than one discharge within the period, be restrained from continuing suit; it not interfering with administration of assets by bankruptcy court.—In re Johnson, U. S. D. C., 233 Fed. 841.

13.——Exemptions.—A referee may charge bankrupt's exemptions with amount of value of goods in possession of bankrupt on eve of bankruptcy, which he failed to surrender to his trustee; there being no reasonable explanation of failure.—In re Aronson, U. S. D. C., 233 Fed. 1022.

14.——Jurisdiction.—That an application to amend an involuntary petition in bankruptcy was not in writing does not deprive the court of jurisdiction, where notice was waived by the express written consent of the bankrupt to the amendment.—International Silver Co. v. New York Jewelry Co., U. S. C. C. A., 233 Fed. 945.

13.——Jurisdiction.—The mere pendency of an involuntary petition in bankruptcy does not deprive the court of jurisdiction to entertain a voluntary petition and adjudicate thereunder.—International Silver Co. v. New York Jewelry Co., U. S. C. C. A., 233 Fed. 945.

16.——Jurisdiction.—That a fund in which a bankrupt had an interest was held in trust during the life of another by a trustee appointed by a state court did not deprive the court of bankruptcy of jurisdiction to administer such interest. (Per Smith, Circuit Judge.)—Pollack v. Meyer Bros. Drug Co., U. S. C. C. A., 233 Fed. 861.

17.——Porto Rico.—Civ. Code Porto Rico, § 1824, subd. 6, which is part of an extensive scheme for distributing insolvent estates, does not entitle creditor, because of an agricultural loan, to priority, being opposed to Bankr. Act, § 64b.—Gandia & Stubbe v. Cadierno, U. S. C. C. A., 233 Fed. 739.

18.——Practice.—Where two bankrupt estates were liable for debt due a bank, the entire claim might be proven against both, and the fact that security not applied to the debt had been given by one bankrupt will not diminish the claim against the other.—In re New York Commercial Co., U. S. C. C. A., 233 Fed. 906.

19.——Practice.—A court of bankruptcy is an equity court, and subject to new equity rule 29 (198 Fed. xxvi), abolishing demurrers in equity suits. (Per Smith, Circuit Judge.)—Pollack v. Meyer Bros. Drug Co., U. S. C. C. A., 233 Fed. 861.

20.——Practice.—Under General Orders in Bankruptcy, title, "Amendments" (89 Fed. vii, 32 C. C. A. vii), a voluntary petitioner in bankruptcy, in applying for leave to amend his schedule, must state the cause of the error in those originally filed.—In re Brincat, U. S. D. C., 233 Fed. 811.

21.——Preference.—Where owner of mercantile business assigns to creditor fire policy to enable creditor to collect same and apply it in payment of prior loan, assignment is not an un-

lawful preference, within Bankruptcy Act, though made within four months of bankruptcy, where it was made pursuant to prior agreement by which policy was pledged as security for advances.—Hecker v. Commercial State Bank of Carrington, N. D., 156 N. W. 97.

22.——Preference.—That, after adjudication in bankruptcy on a voluntary petition, creditors who filed an involuntary petition filed their claims with the referee, does not deprive them of their right to attack a preferential transfer.—International Silver Co. v. New York Jewelry Co., U. S. C. C. A., 233 Fed. 945.

23.——Priority.—Under Act Pa. June 16, 1836 (P. L. 777), § 83, a landlord, who after levy on his tenant's goods distrained for rent, acquired priority, which continued despite the subsequent bankruptcy of the tenant.—In re Gerrow, U. S. D. C., 233 Fed. 845.

24.——Priority.—Section 1825(4)a of the Porto Rico Code, relating to acknowledgment of notes by notarial seal, if resorted to by a creditor and an insolvent debtor within four months of his bankruptcy, to defeat the Bankruptcy Act, cannot be recognized as establishing a priority in such creditor's favor.—In re Vidal, U. S. C. C. A., 233 Fed. 733.

25.——Priority.—Under Landlord and Tenant Act N. J., § 4, and Bankr. Act, § 64b, subd. 5, a New Jersey landlord, who had not perfected his lien on goods on the demised premises by distraint, may, after bankruptcy, assert his priority, subject to payment of costs of proceeding.—In re Braus, U. S. D. C., 233 Fed. 835.

26.——Revocation of Agency.—Where defendant commissioned a dealer in paintings to purchase them for him and to resell them on commission, the dealer's bankruptcy, possession of the paintings being delivered to the dealer, revoked the agency.—McKey v. Clark, U. S. C. C. A., 233 Fed. 928.

27.——Statutory Construction.—Bankr. Act, § 47a, as amended, giving trustees rights of a creditor holding a lien, is not retroactive, and the right of trustee dates only from the filing of petition in bankruptcy, and does not extend to transfers recorded within four months prior to petition, though applicable to transfers thereafter.—Bunch v. Maloney, U. S. C. C. A., 233 Fed. 967.

28.——Territory.—Under Organic Act April 12, 1900, § 14, local Porto Rico legislation, relating to insolvent estates in opposition to the Bankruptcy Act, is of no effect.—In re Vidal, U. S. C. C. A., 233 Fed. 733.

29.——Wage-Earners.—Where wage-earners had priority as to the two funds realized from bankrupt's assets, while landlord had priority as to only one, and the two claims exceeded the amount of the funds, the claims of the wage-earners should first be satisfied out of the fund as to which the landlord had no lien.—In re Gerrow, U. S. D. C., 233 Fed. 845.

30. **Banks and Banking**—Depositor.—A depositor who makes a note payable at a bank impliedly authorizes the bank to pay it and charge to his account, so that the bank may pay and cancel such a note and debit the account of the depositor.—Heinrich v. First Nat. Bank of Middletown, N. Y., 113 N. E. 531, 219 N. Y. 1.

31.——Public Policy.—In suit in Tennessee to collect arbitrary assessments on stock by the New York banking commissioner, the question is not whether the statute authorizing such assessments is valid, but whether public policy of Tennessee permits such power to vest in a ministerial officer.—Van Tuyl v. Carpenter, Tenn.,

32. **Bills and Notes**—Evidence.—Where maker of judgment note conveyed realty in consideration of agreement to pay debts of maker including the note, the trial court properly found that the note had been paid.—Spencer v. Spencer, Pa., 98 Atl. 571.

33.——Renewal.—A "renewal" of a note is the giving of a new note in the place of the former one, and a contract for renewal contemplates a new note, to which the parties are the same, but is not an agreement for an extension.—Wilcox v. McCain Land & Live Stock Co., S. D., 159 N. W. 49.

34. **Building Restrictions**—Police Power.—Laws 1912, c. 693, § 1, forbidding erection of dwelling houses in section of city unless constructed as a separate building with certain spaces between, etc., held not within the police power, and unconstitutional as an invasion of property rights.—Byrne v. Maryland Realty Co., Md., 98 Atl. 547.

35. **Burglary**—Indictment and Information.—An indictment for breaking into a building of the "Hill Grocery Company," not averring it was a corporation or partnership, and averring felonious taking from "Hill Grocery Company, a body corporate," was insufficient.—Noah v. State, Ala., 72 So. 611.

36. **Carriers of Goods**—Bill of Lading.—Notwithstanding absence of any agreement indorsed on bill of lading to deliver war beans in time for particular market, carrier was bound to deliver them with reasonable dispatch and liable for loss to shipper from fall in market price or damage to them, or from combination of such causes.—Stevens v. Northern Cent. Ry. Co., Md., 98 Atl. 551.

37. **Carriers of Live Stock** — Damages.—Though a shipping contract fixed the maximum recovery for injuries to cattle at $30 per head, recovery for injuries to the animals may be had, though after the injuries their value exceeded $30.—Southern Pac. Co. v. Stewart, U. S. C. C. A., 233 Fed. 956.

38.——28-Hour Law.—The 28-Hour Law relating to the transportation of cattle will not justify the unloading in hot and dusty pens, unprotected from the sun.—Southern Pac. Co. v. Stewart, U. S. C. C. A., 233 Fed. 956.

39. **Carriers of Passengers**—Nonsuit.—Where passenger, who sought to recover for personal injuries resulting from violent starting and jerking of street car, stated that car started violently, but there was no evidence as to any unusual or violent starting of car, nonsuit should be granted.—Uffelman v. Philadelphia Rapid Transit Co., Pa., 98 Atl. 574.

40. **Chattel Mortgages**—Crops.—Lien of chattel mortgage on tenant's interest in crop to be grown under a farm lease, after division of crop and settlement, attached to tenant's legal interest, regardless of who was in actual possession of the property.—National Bank of Wheaton, Minn., v. Elkins, S. D., 159 N. W. 60.

41. **Commerce**—Employes.—A carpenter, riding on a train which carried the equipment for repair of a bridge used by railroad company in interstate commerce is, where the repairs were to be made by him, engaged in interstate commerce.—Grand Trunk Ry. Co. of Canada v. Knapp, U. S. C. C. A., 233 Fed. 950.

42.——Workmen's Compensation Act.—Recovery by railroad employe, injured while engaged in interstate commerce, for negligence of company, held governed by federal Employers' Liability Act, and not Michigan Workmen's Compensation Act, despite provisions of point 6, § 4, authorizing its application to employes engaged in intra and interstate commerce, where their duties can be separated.—Grand Trunk Ry. Co. of Canada v. Knapp, U. S. C. C. A., 233 Fed. 950.

43. **Constitutional Law**—Administrative Legislation.—The argument that, if an act is invalid when passed, the vice continues and the statute may be annulled at any time does not apply to political or administrative legislation, but such laws must be attacked in seasonable time without delay.—State v. Howell, Wash., 159 Pac. 777.

44.——Statutory Construction.—Where a statute is intended merely to raise revenue; it may be interpreted as not prohibiting and rendering void a contract violating its terms.—Albertson & Co. v. Shenton, N. H., 98 Atl. 516.

45.——Vested Right.—Acts and expenditures of defendant, pursuant to permit to erect advertising signs, held not such as to create a vested right, relieving its assignee from observance of ordinance, subsequently enacted, imposing a limitation on the height of such billboards.—People ex rel. Publicity Leasing Co. v. Ludwig, N. Y., 113 N. E. 532, 218 N. Y. 540.

46. **Contracts**—Waiver.—Owner waived any right under uniform building contract to arbitrate disagreements with contractor, where he moved into the building in October, and, until shortly before contractor sued for his balance in January, raised no objection to the amount certified by architect as due, and did not suggest arbitration until the following September.—McEvoy v. Willard E. Harn Co., Md., 98 Atl. 522.

47. **Corporations**—Capital Stock.—Where incorporators obtained charter before minimum capital stock had been subscribed and then solicited subscribers, the corporation obtaining credit, it is no defense in a suit against subscribers on insolvency of the corporation that the corporation was organized and transacted business before its minimum capital stock was subscribed.—Chappell v. Lowe, Ga., 89 S. E. 777.

48.——Dissolution.—Upon attempted dissolution of a corporation, the secretary of state is not required to issue a certificate of dissolution, unless the certificate of the comptroller as to payment by the corporation of taxes is filed with him under 2 Comp. St. 1910, p. 1620, § 31a.—American Woolen Co. v. Edwards, N. J., 98 Atl. 470.

49.——Waiver.—Even if failure to resell stock at certain price were legitimate ground for rescission, the purchaser, after payment on the note and giving a new note after expiration of the time for resale, thereby waived that covenant, or was estopped from setting up breach thereof.—Majors v. Girdner, Cal., 159 Pac. 826.

50. **Damages**—Measure of.—Measure of damages for trespass, with impairment of riparian rights, is not difference between value before and after trespass; but where removable things were put on the property destroying its use, was the reasonable cost of removing and restoring the original condition.—Clark Lloyd Lumber Co. v. Puget Sound & C. Ry. Co., Wash., 159 Pac. 774.

51.——Remittitur.—Where jury has assessed amount of damages, with interest from certain date, it is not error to require plaintiff to remit portion of interest ascertainable by date which determines inception of cause of action and enter judgment for the aggregate of principal and remaining interest.—Millan v. Bartlett, W. Va., 89 S. E. 711.

52. **Death**—Damages.—In an action to recover for the negligent killing of one who was conducting a dairy, the difference between the gross receipts and the net receipts of the dairy, after deducting the rent of the land and expenses, cannot be taken as the earnings of deceased, and thus furnish a standard for estimating the value of his life.—Powell v. Berry, Ga., 89 S. E. 753.

53. **Deeds**—Acceptance of Benefits.—One who accepted benefits of deed, providing for payment of grantor's debts, is as fully bound as if he had signed it.—Spencer v. Spencer, Pa., 98 Atl. 571.

54. **Divorce**—Custody of Child.—That the mother has been indiscreet with men subsequent to divorce, in the absence of proof of moral turpitude, is not sufficient to deprive her of custody of her child awarded by the decree.—Freeland v. Freeland, Wash., 159 Pa. 698.

55. **Descent and Distribution**—Advancement.—Advancements do not bear interest of themselves, but only by force of the testator's intent clearly expressed in the will.—In re Knight's Estate, Pa., 98 Atl. 558.

56. **Electricity**—Negligence. — Notwithstanding wires of an electric company were originally properly constructed, it was bound to maintain them so as to prevent their coming in contact with other wires that might thereafter be stretched across the street, and to keep them properly insulated.—Gulf States Telephone Co. v. Evetts, Tex., 188 S. W. 289.

57. **Explosives**—Proximate Cause.—Company, leaving open chest containing explosive caps on public highway where children played, was not liable when boys stole a box of the caps, carried it off, and in an explosion the next day killed plaintiff's intestate, since his death was not the proximate result of its act.—Perry v. Rochester Lime Co., N. Y., 113 N. E. 529, 219 N. Y. 60.

58. **Husband and Wife**—Community Property.—Community property undisposed of by decree of divorce remains undisturbed so far as the respective interests of the members of the community therein are concerned, and is recoverable in another action; personal property of one spouse constituting no exception.—Harvey v. Pocock, Wash., 159 Pac. 771.

59.——Holding Out.—Where defendant had gone through form of marriage with alleged wife then married, lived with her and held her out as his wife, his status for purposes of an action against him for goods furnished her on his credit was the same as if the marriage had been a legal one.—Frank v. Carter, N. Y., 113 N. E. 549, 219 N. Y. 35.

60. **Insurance**—Accident Policy.—An accident policy, which provides for payment of the principal sum in case of death from sunstroke due to external, violent, or accidental means, does not cover death of a fireman from sunstroke resulting from exposure and heat while in performance of his ordinary duties.—Continental Casualty Co. v. Pittman, Ga., 89 S. E. 716.

61.——Beneficiary.—After death of insured, insurer could not change the status of the beneficiary by rescission of the policy.—Oplinger v. New York Life Ins. Co., Pa., 98 Atl. 568.

62.——Change of Beneficiary.—Where an industrial life policy designated insured's first wife as beneficiary and she died, a second wife held not entitled to the proceeds; the designation not having been changed.—In re Shanley, N. Y., 160 N. Y. Supp. 733.

63.——Foreign Corporation.—The state may impose stringent conditions on foreign insurance companies incident to every transaction within its limits of the insurance business, and may even go so far as to exclude them altogether.—Adamson v. Schreiner, N. Y., 160 N. Y. Supp. 745.

64.——Incontestability.—Under Rev. St. 1911, art. 4741, a life policy providing, "This policy shall be incontestable after it has been in force one year, providing premiums have been duly paid," was not contestable four years after it was issued, on the ground that it was obtained by fraudulent representations of the insured as to his health and use of alcoholic drinks.—Southern Union Life Ins. Co. v. White, Tex., 188 S. W. 266.

65.——Insurable Interest.—One who loans money to a business concern, taking as collateral security an assignment of a fire policy on the goods used by the borrower in his business, has an insurable interest, within Comp. Laws, 1913, § 6466.—Hecker v. Commercial State Bank of Carrington, N. D., 159 N. W. 97.

66.——Iron Safe Clause.—Paper containing an iron safe clause inclosed in envelope, in which policy on stock of goods, etc., was sent to insured, held no part of policy.—Merchants' & Bankers' Fire Underwriters v. Brooks, Tex., 188 S. W. 243.

67.——Medical Examination.—The duty of the applicant for life insurance to disclose a material change for the worse in his health after the making of the application and medical examination and before the issuance of the policy implies knowledge on the applicant's part of such change.—Fitzgerald v. Metropolitan Life Ins. Co., Vt., 98 Atl. 498.

68.——Waiver.—Employers' liability insurer, by recognizing responsibility to employe by settlement, waived any right to avoid policy to defeat payment to insured of money received in such settlement for him to cover advances made to employe.—Griffith v. Frankfort General Ins. Co., N. D., 159 N. W. 19.

69. **Intoxicating Liquors**—Evidence. — Under Acts 1915, p. 33, § 32½, and pages 44, 45, 47, as to prima facie proof in liquor prosecutions, testimony that there was found in defendant's house about three quarts of liquor which had the appearance of whiskey, besides 500 gallons of beer, made a prima facie case in prosecution for violating the prohibition law.—Ogles v. State, Ala., 72 So. 598.

70.——Presumption.—Under prohibition law, mere possession of prohibited liquors at a place other than the home or dwelling creates a presumption that they are kept for an unlawful use.—Ogden v. State, Ala., 72 So. 587.

71. **Landlord and Tenant**—Surrender.—A surrender is the yielding up of an estate for life or years to the remaindermen or reversioner, and is created by law when parties to a lease do some act so inconsistent with the relation of landlord and tenant as to imply consent to termination thereof, and estop the parties to dispute the fact of surrender.—Triest & Co. v. Goldstone, Cal., 159 Pac. 715.

72. **Libel and Slander**—Libel per se.—A newspaper article falsely charging that plaintiff, as mayor of a city, offered gross indignities to a woman lecturer because of her stand on child labor which was employed in a cotton mill of which he was superintendent, held libelous per se.—Atlanta Journal Co. v. Pearce, Ga., 89 S. E. 759.

73. **Mandamus**—Administrative Duty.—If the municipal superintendent of buildings wrongfully refuses to remove a roof sign, violative of ordinance restricting height, mandamus is available to any citizen to hold him to performance of his duty.—People ex rel. Publicity Leasing Co. v. Ludwig, N. Y., 113 N. E. 532, 218 N. Y. 540.

74.——Discretion.—A judge of an inferior court should not be compelled to prepare a statement of facts, unless it appears that it was the duty of such judge to prepare the statement.—Dobie v. Scott, Tex., 188 S. W. 286.

75.——Ministerial Duty.—Mandamus lies to enforce a valid contract of a board of county commissioners to redeem warrants by levy of a special tax.—Board of Revenue of Shelby County v. Farson, Son & Co., Ala., 72 So. 613.

76. **Marriage**—Annulment.—The wife's epilepsy, limiting, but not preventing, copulation, is not, in the absence of fraud, ground for annulment of the marriage.—Elser v. Elser, N. Y., 160 N. Y. Supp. 724.

77. **Master and Servant**—Independent Contractor.—Where one was killed while cutting firewood at a certain price per cord under employment by agent of contractor with landowner to have the wood cut, deceased furnishing his own working tools, determining his own hours of labor, and his compensation depending on measurement of his work, relation of master and servant did not exist.—Donlon Bros. v. Industrial Acc. Commission of State of California, Cal., 159 Pac. 715.

78.——Independent Contractor.—One who furnished teams and drivers to a contractor, and who received a certain sum per day for the work of each team and driver, and who himself drove one of such teams, held not a servant of such contractor entitled to compensation for injuries, notwithstanding that control was exercised by the contractor in directing the drivers as to the materials to be hauled.—Western Indemnity Co. v. Pillsbury, Cal., 159 Pac. 721.

79. **Mines and Minerals**—Defeasible Conveyance.—Where oil and gas contract amounts to defeasible conveyance of interest in fee, assignee, who does not specially assume burdens therein is not bound.—Pierce Fordyce Oil Ass'n v. Woodrum, Tex., 188 S. W. 245.

80.——Oil and Gas Lessee.—Oil and gas lessee who assigned portion of interest in lease and agreed with assignee to pay delay rentals and to notify assignee before permitting leases to lapse impliedly covenanted not to dispose of lease to stranger without consent of assignee.—Millan v. Bartlett, W. Va., 89 S. E. 711.

81. **Municipal Corporations**—Action. — Unevenness and roughness produced by travel through snow and slush, which afterwards freezes and presents no obstructive or dangerous features which are not common to general snow and ice, are not to be classed as actionable defects.—Albritton v. Kansas City, Mo., 188 S. W. 239.

82.——Automobiles.—Laws 1911, c. 133, § 20, requiring automobile drivers knowing that they have injured a person to stop, and give information to any proper person applies even where the only person to be found is the injured party, and he is unconscious, but the accident occurred at 6 p. m. on a city street where persons might be expected to pass.—State v. Sterrin, N. H., 98 Atl. 482.

83. **Names**—Idem Sonans.—Under Code Civ. Prac., § 1963, subd. 25, providing that the identity of a person from the identity of name is to be presumed unless controverted by other evidence, and the rule idem sonans, the name "Dimetra" may be said to mean the name "Demetra."—Brusshi v. Cooper, Cal., 159 Pac. 728.

84. **Negligence**—Reduction of Damages. — Under the federal Employers' Liability Act, contributory negligence of injured employe does not bar recovery for railroad's negligence, but diminishes damages.—Western Ry. of Alabama v. Mays, Ala., 72 So. 641.

85. **Parent and Child**—Statutory Construction.—3 Rem. & Bal. Code, § 5933, subd. 1, providing that every person who: First, having a dependent child under age of 16 years, deserts such child with intent to abandon it; second, willfully omits, without lawful excuse, to furnish necessary food, clothing shelter, or, medical attendance—shall be guilty of a gross misdemeanor, defines the offenses disjunctively, and must be read as if "or" occurred between the subdivision.—State v. Gipson, Wash., 159 Pac. 792.

86. **Partition**—Parties to Action. — Though partition is brought by one not a tenant in common, the defect is not jurisdictional, and decree of sale is not void.—Harrison v. Higgins, N. Y., 113 N. E. 551, 218 N. Y. 556.

87. **Principal and Agent**—Power of Attorney. —Where one entitled to share in estate executed power of attorney to enable his counsel to close up the estate, attorney cannot, over 20 years after power was given, convey lands belonging to estate which beneficiary had seen, declared to be worthless and had abandoned.—Milwee v. Waddleton, U. S. C. C. A., 233 Fed. 989.

88.—Scope of Agency.—While as a general rule the collecting power of an agent is limited to receiving legal tender, he may, in collecting from a school district, accept warrants of such district.—Woodworth v. School Dist. No. 2, Stevens County, Wash., 159 Pac. 757.

89.——Scope of Agency.—Where plaintiff owned note and chattel mortgage, it was not within the scope of the authority of its agent for collection to waive the lien of the mortgage.—National Bank of Wheaton, Minn., v. Elkins, S. D., 159 N. W. 60.

90. **Quo Warranto**—Special Interest.—The directors of an old district from which a new one was carved have such special interest as to enable them in their own name to maintain quo warranto proceedings to test the legality of the formation of a new district.—Tallmadge v. Walker, N. D., 159 N. W. 71.

91. **Railroads**—Crossing.—As a general rule the rights and duties of the public and a railroad company at a public crossing are mutual and reciprocal, both being charged with the mutual duty of keeping a careful lookout to avoid injury, with the degree of diligence of a prudent person under the circumstances at the particular time and crossing.—Bergeron v. Minneapolis & St. L. R. Co., S. D., 159 N. W. 51.

92.——Evidence.—That a fire was discovered in plaintiff's mill, in which there had been no fire for several days, shortly after defendant's engine passed, will not, where the engine was equipped with spark arresters, and no sparks were shown to be emitted, warrant a verdict against defendant.—Seaboard Air Line Ry. v. Jarrell, Ga., 89 S. E. 718.

93.——License.—Decedent, killed while walking on the tracks of defendant's switchyard, which until two days before the accident had been necessarily used as a thoroughfare because a parallel street was impassable, held a naked licensee using the switchyard by sufferance of defendant.—Scharf v. Spokane & I. E. R. Co., Wash., 159 Pac. 797.

94.——Negligence.—One walking on one of two or more railroad tracks, knowing that train is approaching, is chargeable with negligence if he fails to ascertain on which track the train is.—Biddle v. Philadelphia, B. & W. R. Co., Pa., 98 Atl. 566.

95.——Proximate Cause.—A traveler whose horse was frightened by noises incident to operation of railroad train cannot recover for injuries resulting from runaway; the noises not being unnecessary.—Lusk v. Pugh, Okla., 159 Pac. 855.

96. **Receivers**—Apportionment. — It is not enough to authorize appointment of receiver without notice to allege that party applying therefor is entitled to possession of real or personal property involved and that it is being wasted, but petition must further show that application will probably suffer irreparable loss if receiver is not appointed without delay necessary in giving notice to opposite party.—Simpson v. Alexander, Tex., 188 S. W. 285.

97. **Release**—Evidence.—Where an injured lineman was incapable of knowing and appreciating the effect of the release, he was not competent to authorize his brother to execute it for him.—Gulf States Telephone Co. v. Evetts, Tex., 188 S. W. 289.

98. **Sales** — Implied Promise. — In action against church trustees for price of pipe organ originally sold to choir association, mere retention and use of organ while unsuccessful attempts are made to have church assume responsibility for price does not raise implied promise of trustees to pay therefor.—Henry Pilcher's Sons v. Thompson, Ga., 89 S. E. 698.

99.——Warranty.—Under warranty requiring immediate return of tractor if it could not be made to do good work, offered return 40 days after failure of tractor is too late.—Purcell v. International Harvester Co. of America, S. D., 159 N. W. 47.

100. **Specific Performance** — Merchantable Title.—Where contract for sale of two parcels of land provided that, if the title of the vendor to either parcel should not be good and merchantable, and could not be made so, then the trade should be void and canceled, the purchaser is not, the vendor having no title whatever to one of such parcels, entitled to specific performance, but the contract is void under its terms.—Marchman v. Fowler, Ga., 89 S. E. 780.

101.——Parties to Actions.—The transfer of a note for purchase money of land by delivery merely passes the vendor's lien, but if the legal title to the note still remain in the transferor, he should be a party to a suit to enjoin delivery and for specific performance of the contract in consideration of which the note was given.—Camody v. Webster, Ala., 72 So. 622.

102.——Part Performance.—Where vendor of lot has permitted vendee to take possession, partly perform contract, and alter his position by improvements, mistake of vendor as to area of lot will not justify refusal to compel specific performance by the vendor.—Welch Pub. Co. v. Johnson Realty Co., W. Va., 89 S. E. 707.

103. **Subrogation**—Contract.—Subrogation is not founded on contract, and may be enforced in absence of contract, but, where liability of a party is fixed by contract or statute, courts will not resort to equity to either enlarge or defeat it.—Southwestern Surety Ins. Co. v. Pacific Coast Casualty Co., Wash., 159 Pac. 788.

104.——New Security.—Where plaintiff paid the lien note on request of the maker, under agreement with him that a new security would be given when the personalty was released, and without knowledge or notice of a junior mortgage to a third person, equity will decree plaintiff's lien superior to that of the third party.—Hill v. Ritchie, Vt., 98 Atl. 497.

105. **Tenancy in Common**—Partition.—Where an heir acquired the interest of the mortgagee of land of his ancestor adverse to coheirs, under such circumstances that title went to benefit coheirs and there was a partition agreement by which each heir acquired a lien on the property or indebtedness of several heirs to the estate, and it was decreed that they might redeem in solido on paying their indebtedness, their respective liens should be valued, not of the date of the contract creating them, but of the date of redemption.—Caldwell v. Caldwell, Ala., 72 So. 621.

106. **Tender**—Plea of.—Where tender of rent in the form of a check was not refused because it was not made in cash, the landlord, in his action for a forfeiture could not claim that the tender should have been made in money and not by check.—Moore v. Twin City Ice & Cold Storage Co., Wash., 159 Pac. 779.

107. **Trespass**—Blasting Operations.—Where defendant so conducted blasting operations in quarry as to cast rocks on adjoining property, it is liable for the direct trespass without regard to negligence.—Mulchanock v. Whitehall Cement Mfg. Co., Pa., 98 Atl. 554.

108. **Trusts**—Active Trust.—An active trust, created as a protection to the beneficiary for any purpose not illegal, must be executed, and cannot be destroyed, even by a conveyance by the trustee to the beneficiary.—In re Stewart's Estate, Pa., 98 Atl. 569.

109. **Vendor and Purchaser**—Executory Contract.—Complaint of purchasers to recover of the vendor payment made on executory contract, alleging he without cause repudiated it, declared it canceled, and denied to them any right or interest thereunder, states a cause of action on the ground of rescission.—McNeil v. Kredo, Cal., 159 Pac. 818.

110.——License.—An agreement that, pending condemnation proceedings, plaintiff might enter upon and remove gravel from two acres of defendant's land, held not to constitute a purchase and sale of two acres of the land, nor of the entire tract, but amounted to a license to enter upon and remove gravel from a tract of land not exceeding two acres in extent.—Fairmount & V. Ry. Co. v. Bethke, S. D., 159 N. W. 56.

111.——Notice.—One who purchases property knowing that certificate for mechanic's lien has been filed against it is in no better position than his grantor.—Peck v. Brush, Conn., 98 Atl. 561.

112.——Record.—The failure to record the trustee's deed, if executed or subsequently lost, and the nonrecording and subsequent loss of papers in foreclosure suit in which vendor purchased, did not constitute a ground for refusing to accept his title.—Goldman v. Miles, Md., 98 Atl. 531.

113.——Rescission.—Where a vendor, after the purchaser's breach of his contract agreed to a mutual abandonment and rescission, and promised to repay the purchaser the amount paid under the contract as soon as the land was sold, the purchaser was entitled to a repayment of his money.—Hay v. Casey, Cal., 159 Pac. 726.

114. **Warehousemen**—Bailment.—As between the holder of a storage ticket and a warehouseman, a bailment exists with title of the particular grain in the holder; hence refusal to deliver stored grain sufficiently lays a basis for conversion against the warehouseman and sureties on his official bond.—State v. Daniels, N. D., 159 N. W. 17.

115. **Wills**—Contingent Remainder.—A contingent remainder to a definite person is transmissible by devise, although person to whom it is limited dies before the contingency happens.—Myers v. McClurg, Md., 98 Atl. 491.

116.——Postponed Enjoyment.—Will giving life estate without power of disposal to wife, and on her death to two others under like restrictions, and then in the same way to the survivor of the two, and after the death of the wife and the two others to be equally divided among the children of one of the two, merely defers enjoyment by such children, but vests the estate in the children living at the time of the testator's death.—Martin v. Cook, Md., 98 Atl. 489.

117.——Specific Performance.—Where decedent breached contract to make devise, an action based on such breach is essentially one for specific performance, or, if that is impossible, for damages which are measured by the value of the property agreed to be devised.—Gordon v. Spellman, Ga., 89 S. E. 749.

# Central Law Journal.

A LEGAL WEEKLY NEWSPAPER.

Continuing by Special Arrangement, the Green Bag, from and after January 1, 1915, Volume 80 of the Central Law Journal, succeeding Volume 26 of the Green Bag.

Published by

**Central Law Journal Company**

403 OLIVE STREET, ST. LOUIS, MO.

To whom all communications should be addressed.

Subscription price, Five Dollars per annum, in advance. Subscription price, including two binders for holding two volumes, saving the necessity for binding in book form, Six Dollars. Single numbers, Twenty-five Cents.




Entered at the Post-Office, St. Louis, Mo., as second-class matter.

NEEDHAM C. COLLIER, EDITOR-IN-CHIEF.

ALEXANDER H. ROBBINS, MANAGING EDITOR.

## CONTENTS